UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID Q. WEBB,

Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, *et al.*,

Defendants.

CASE NO. 3:21-cv-05761-BHS

ORDER TO SHOW CAUSE OR AMEND THE PROPOSED COMPLAINT

This matter is before the Court on plaintiff's motion to proceed *in forma pauperis* ("IFP") and proposed complaint (Dkt. 1) and on referral from the District Court.

Plaintiff proceeds *pro se* and his proposed complaint is subject to screening by the Court under 28 U.S.C. § 1915(e)(2), which requires dismissal of a complaint that is frivolous, malicious, or fails to state a claim upon which relief can be granted. Plaintiff's proposed complaint fails to state a claim upon which relief can be granted. However, the Court will grant plaintiff an opportunity to amend his proposed complaint to correct the deficiencies set forth herein.

If plaintiff chooses to amend his proposed complaint, he must file his amended proposed complaint on or before November 26, 2021. Failure to do so or to comply with this Order will result in the undersigned recommending dismissal of this matter without prejudice, meaning that plaintiff will be able to bring is claims at a later date.

Finally, because it does not appear that plaintiff has presented this Court with a viable claim for relief, the Court declines to rule on his IFP motion at this time. Instead, the Clerk shall renote the IFP motion for the Court's consideration on November 26, 2021.

BACKGROUND

Plaintiff brings suit against twenty-seven defendants, which include the State of Washington, Kitsap County, the Kitsap County Sheriff, several prosecutors and public defenders, thirteen corrections officers, and medical providers. *See* Dkt. 1-1, at 2, 11–17. Plaintiff's claims appear to arise out of criminal charges brought against him in 2019 and events that transpired while he was a pretrial detainee. *See* Dkt. 1-1, at 26–44. He appears to bring his claims under 42 U.S.C. §§ 1983, and 2000d. *See id.* at 19–20. Plaintiff is seeking damages. *See id.* at 44.

DISCUSSION

I. Legal Standard

A complaint "must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). To state a claim on which relief may be granted, plaintiff must go beyond an "unadorned, the-defendant-harmed-me accusation[s]," "labels and conclusions," and "naked assertions devoid of further factual enhancement." *Id.* at 678 (internal quotation marks and citations omitted). Although the Court liberally interprets a *pro se* complaint, even a liberal interpretation will not supply essential elements of a claim that plaintiff has not pleaded. *Ivey v.*

Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982). In addition to setting forth the legal framework of a claim, there must be sufficient factual allegations undergirding that framework "to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

When a plaintiff is proceeding *pro se*, this Court must "'construe the pleadings liberally and . . . afford the [plaintiff] the benefit of any doubt.'" *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (internal citation omitted). The claims will be dismissed only where it "'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012) (internal citation omitted).

I. Form of Complaint

Plaintiff's proposed complaint includes lengthy recitations of law, excerpts from his habeas petition, contains a settlement offer, and presents a series of allegations without clearly identifying causes of action, which makes it particularly difficult to determine what claims plaintiff intends to bring. Plaintiff should be aware that a complaint that is too verbose, long, confusing, redundant, irrelevant, or conclusory may be dismissed for failure to comply with Rule 8. *See Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1058–59 (9th Cir. 2011) (citing cases upholding dismissals for those reasons). If plaintiff chooses to amend his proposed complaint, he is encouraged to review the proper forms and information for *pro se* filers, including a *pro se* handbook, that can be found on the district court's website at https://www.wawd.uscourts.gov/representing-yourself-pro-se.

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II. 42 U.S.C. § 2000d (Title VI)

It appears that plaintiff seeks to bring a Title VI claim against certain defendants. *See* Dkt. 1-1, at 20–23. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to intentional discrimination under any program or activity receiving Federal financial assistance." This statute creates a private cause of action for claims of intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001). To state a claim, a plaintiff must allege that the entity is engaging in discrimination on the basis of a prohibited ground and that the entity receives federal financial assistance. *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994) (citations omitted), *overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001).

District courts in this Circuit have uniformly ruled that defendants in their individual capacities are not subject to suit under Title VI. *See*, *e.g.*, *Corbin v. McCoy*, 3:16-cv-01659-JE, 2018 WL 5091620, at *7 (D. Or. Sept. 24, 2018) (cataloguing cases). This is because Title VI is directed toward programs that receive federal financial assistance, so that there is no private right of action against individual employees or agents of entities receiving federal funding. *Id.* A plaintiff may bring a claim against a defendant who receives federal financial assistance in that defendant's official capacity. *See Braunstein v. Ariz. Dep't of Trans.*, 683 F.3d 1177, 1189 (9th Cir. 2012) (noting that Congress has abrogated the Eleventh Amendment immunity of states for Title VI suits so that suits may be brought against officials in their official capacities).

Here, any claims against defendants in their personal capacity are not actionable under Title VI. *See*, *e.g.*, *Corbin*, 2018 WL 5091620 at *7. Furthermore, plaintiff does not explain how

any particular defendant's actions were motivated by racial discrimination. Plaintiff's proposed complaint states that he is "[c]laiming [a]lleged [i]ntentional [d]iscrimination based on [p]laintiff Webb's [r]ace and [n]ational [o]rigin . . . ." *See* Dkt. 1-1, at 23. However, the proposed complaint does not contain any facts depicting any entity that engaged in discrimination. Therefore, plaintiff has failed to state a colorable Title VI claim.

III. 42 U.S.C. § 1983

To state a claim under § 1983, a plaintiff must allege facts showing (1) the conduct about which he complains was committed by a person acting under the color of state law; and (2) the conduct deprived him of a federal constitutional or statutory right. *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). In addition, to state a valid § 1983 claim, a plaintiff must allege that he suffered a specific injury as a result of the conduct of a particular defendant, and he must allege an affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976).

If the person named as a defendant was a supervisory official, plaintiff must either state that the defendant personally participated in the constitutional deprivation (and tell the Court the things listed above), or plaintiff must state, if he can do so in good faith, that the defendant was aware of the similar widespread abuses, but with deliberate indifference to plaintiff's constitutional rights, failed to take action to prevent further harm to plaintiff and also state facts to support this claim. *See Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978).

Plaintiff must repeat this process for each person he names as a defendant. If plaintiff fails to affirmatively link the conduct of each named defendant with the specific injury suffered by plaintiff, the claim against that defendant will be dismissed for failure to state a claim.

Conclusory allegations that a defendant or a group of defendants have violated a constitutional right are not acceptable and will be dismissed.

A. Claims Against the State of Washington

Plaintiff named the State of Washington Department of Social and Health Services as a defendant. *See* Dkt. 1-1, at 2. However, "[t]he Eleventh Amendment has been authoritatively construed to deprive federal courts of jurisdiction over suits by private parties against unconsenting States." *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 952 (9th Cir. 2008) (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996)). The State's immunity also applies to its agencies, such as the Department of Social and Health Services. *See Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 777 (9th Cir. 2005).

Plaintiff's complaint alleges that the State of Washington is liable for its policies regarding mental evaluations and for not having policies and procedures to avoid violations of constitutional rights. *See* Dkt. 1-1, at 21. However, claims alleging constitutional violations based on state policies must be made against state officials in their official capacity and the remedy sought must be declaratory or injunctive relief. *See Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018). Here, plaintiff did not name a state official as a defendant and is seeking money damages. *See* Dkt. 1-1, at 45. Therefore, plaintiff's proposed complaint fails to state a colorable claim against the State of Washington.

B. Claims Against County Defendants

Plaintiff named Kitsap County and the Kitsap County Sheriff as defendants for the conduct of other defendants. *See* Dkt. 1-1, at 2, 9. However, the Kitsap County Sheriff is not an appropriate defendant because plaintiff "must name the county or city itself as party to the action, and not the particular municipal department or facility where the alleged violation

occurred." *Osborne v. Vancouver Police*, 2017 WL 1294573 at *9 (W.D. Wash. 2017). While municipalities and local government units, such as Kitsap County, are considered persons for § 1983 purposes, they are only liable for policies, regulations, and customs adopted and promulgated by that body's officers. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978). To recover, plaintiff must show that county employees or agents acted through an official custom or policy that permits violation of plaintiff's civil rights, or that the entity ratified the unlawful conduct. *See Monell*, 436 U.S. at 690–91.

Here, plaintiff does not allege that any policy, regulation, or custom of the county violated a Constitutional or statutory right. He merely alleges supervisory liability. *See* Dkt. 1-1, at 29, 40. Therefore, plaintiff has failed to state a claim against the county defendants.

C. Claims Against Prosecutors

Plaintiff named three Kitsap County prosecutors, Jennine E. Christensen, Chad M. Enright, and Kelly Marie Montgomery, as defendants. *See* Dkt. 1-1, at 9–11. Generally, "acts undertaken by a prosecutor 'in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State,' are entitled to the protections of absolute immunity." *Milstein v. Cooley*, 257 F.3d 1004, 1008 (9th Cir. 2001) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997)). However, prosecutorial immunity does not extend to those actions of a prosecutor which are "administrative" or "investigative" in nature. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 341–32 (2009).

Here, plaintiff states that defendants Christensen and Enright acted as "Administrator/Investigator," but does not allege any facts to support this conclusion. *See* Dkt. 1-1, at 9–11. In fact, it appears that their conduct falls squarely within their roles as prosecutors. *See Milstein*, 257 F.3d at 1008. For example, plaintiff's claim against defendant Christensen

seems to be based on her bringing charges against him, because she did not serve him with certain pleadings, and because she made certain arguments in a discovery motion. *See* Dkt. 1-1, at 29–31. The only facts alleged regarding defendant Enright are that he was personally notified of the conduct of the deputy prosecutors. *See id.* at 41. These allegations do not establish that the defendants stepped outside of their role as advocates for the State and, therefore, the proposed complaint does not state a § 1983 claim against them.

Plaintiff also alleges that defendant Montgomery fabricated a lie when she "advised" law enforcement that plaintiff was known to have a "Cache of Guns and Other Dangers [sic] Weapons." Dkt. 1-1, at 26. In certain situations, a prosecutor's advice to law enforcement is considered to be outside of the official role of the prosecutor. *See Burns v. Reed*, 500 U.S. 478, 487, 491–92 (1991). However, plaintiff does not provide enough facts to establish such a claim and he fails to state a § 1983 claim against defendant Montgomery because he does not allege any harm that resulted from that statement. *See Rizzo*, 423 U.S. at 371–72, 377.

D. Claims Against Public Defenders

Plaintiff named public defenders, Curt William Shulz, Paul D. Thimons, Nicholas Joseph Dupont, John Scott Bougher, and Kevin M. Anderson, as defendants. *See* Dkt. 1-1, at 9–12, 16. However, public defenders acting in their role as advocates are not considered state actors for purposes of a § 1983 claim. *See Polk County v. Dodson*, 454 U.S. 312, 320–25 (1981). Even when defense counsel renders ineffective assistance, defense counsel is still not a state actor for purposes of § 1983. *See, e.g.*, *Wood v. Patrick*, 2017 WL 1368981, at *1–*3 (D. Nev. March 15, 2017) *report and recommendation adopted* 2017 WL 1371256 (noting that, although plaintiff alleged his defense counsel provided ineffective assistance, affirmatively misled him, and

breached attorney-client privilege, defense counsel were still not state actors for § 1983 purposes).

Here, plaintiff appears to base his claims against the public defenders on various allegations, ranging from stealing his jewelry to telling his mother not to call their office, all of which he alleges was ineffective assistance of counsel. *See* Dkt. 1-1, at 38–40. However, plaintiff does not state a colorable § 1983 claim against these defendants because he fails to establish that his public defenders were acting under color of law. *See Polk*, 454 U.S. at 325.

E. Claims Against Corrections Officers

Plaintiff named thirteen corrections officers as defendants in their personal and official capacities for a range of conduct that occurred while he was in custody. *See* Dkt. 1-1, at 12–15. Claims against these defendants in their official capacities are treated as claims against the county. *See supra*, section III.B; *Kentucky v. Graham*, 473 U.S. 159, 165 (9th Cir. 1985). As to the claims in their personal capacity, it is unclear what claims plaintiff is attempting to bring against many of these defendants. Plaintiff's proposed complaint contains a lengthy narrative of several interactions with these officers but does not state what federal constitutional or statutory right he was deprived of. The conduct he included in his proposed complaint ranges from certain officers bringing him copies of documents he requested, to threatening to punish him for not eating. *See* Dkt. 1-1, at 26, 33, 35. As previously stated, if plaintiff fails to affirmatively link the conduct of each named defendant with the specific injury suffered by plaintiff, the claim against that defendant will be dismissed for failure to state a claim. Furthermore, conclusory allegations that a defendant or a group of defendants have violated a constitutional right are not acceptable and will be dismissed.

Plaintiff appears to seek a claim for excessive force against certain defendants. *See* Dkt. 1-1, at 36 (alleging that defendant Branson grabbed plaintiff "extremely forceful" from behind). However, to state a colorable claim for excessive force, plaintiff must allege enough facts to establish that (1) defendants used force on plaintiff, (2) defendants' use of force was objectively unreasonable in light of the facts and circumstances at the time, (3) defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff, and (4) defendants' conduct caused some harm to plaintiff. *Kingsley v. Hendrickson*, 576 U.S. 389, 393–395 (2015). Plaintiff has not done that in his proposed complaint.

F. Claims Against Medical Providers

1. Dr. Hedlund

Plaintiff named Dr. Lynn Hedlund as a defendant for her role in his solitary confinement. *See* Dkt. 1-1, at 41–42. Liberally construing plaintiff's proposed complaint, it appears he is alleging a violation of his Due Process rights. The Due Process Clause of the Fourteenth Amendment protects pretrial detainees by prohibiting the State from punishing them. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Absent evidence of intent to punish, a pretrial detainee's right to be free from punishment are not violated if conditions or restrictions used are reasonably related to a legitimate objective. *See Block v. Rutherford*, 468 U.S. 576, 584 (1984) (citing *Bell*, 441 U.S. at 538–39 (1979)).

Here, plaintiff alleges that he was placed in a "suicide holding cell" because he did not eat and that defendant Hedlund "would only allow [plaintiff] to be [r]eleased . . . if [h]e agreed not to [h]arm himself." Dkt. 1-1, at 41. Based on these facts, it is not clear how the restrictions imposed on plaintiff were not related to a legitimate objective. *See Block*, 468 U.S. at 584.

Plaintiff does not provide any facts to the contrary. Therefore, as is, plaintiff's proposed complaint does not state a colorable claim against defendant Hedlund.

2. Naphcare

Plaintiff named NaphCare as a defendant based on vicarious liability for Dr. Hedlund's conduct. *See* Dkt. 1-1, at 41. However, "[t]here is no respondeat superior liability under [§] 1983." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *See also Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 798 (9th Cir. 2018) (explaining a supervisory official is liable under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." (quotation marks and citation omitted)).

He also appears to allege deliberate indifference to his medical needs regarding a dental procedure. *See id.* at 35. To establish a claim for deliberate indifference to his serious medical needs, a plaintiff must demonstrate the following: (1) a defendant made an intentional decision with respect to plaintiff's medical condition; (2) the condition put plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable measures to abate the risk; and (4) by not taking such measures, the defendant caused plaintiff injury. *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).

Here, plaintiff alleges that he waited four to six weeks before "Kitsap County Sheriff Office Jail and the Medical Contractor (Naphcare) arranged to have the [t]eeth [e]xtracted by a [c]ontract [d]entist. Dkt. 1-1, at 35. He alleges that he suffered a staphylococcal infection as a result of the delay. *Id.* However, plaintiff does not allege enough facts to show that defendant Naphcare made an intentional decision to delay his dental procedure. It is also unclear what caused his infection. At another point in the complaint, plaintiff states that "it took the [d]ental

[c]ontract [p]rovider more than [o]ne (1) [h]our to pull the 2nd of [t]wo (2) [t]eeth, which eventually lead [sic] to the [c]ontraction of some form of Staphylococcal Infection." Dkt. 1-1, at 44. Therefore, plaintiff's proposed complaint fails to establish a colorable claim against defendant Naphcare. If plaintiff chooses to bring this claim in an amended proposed complaint, he must include enough to demonstrate the four things listed above.

3. Nurse Fletcher

Plaintiff named nurse LeShara Fletcher as a defendant for making slanderous statements against him. *See* Dkt. 1-1, at 17, 44. Liberally construing plaintiff's complaint, the Court interprets this as a claim for defamation. "There are two ways to state a cognizable § 1983 claim for defamation-plus: (1) allege that the injury to reputation was inflicted in connection with a federally protected right; or (2) allege that the injury to reputation caused the denial of a federally protected right." *Herb Hallman Chevrolet v. Nash–Holmes*, 169 F.3d 636, 645 (9th Cir. 1999). "[R]eputational harm alone does not suffice for a constitutional claim." *Miller v. California*, 355 F.3d 1172, 1178 (9th Cir. 2004).

Here, plaintiff alleged that defendant Fletcher "made a Slanderous Statement" when she recorded in his medical record that plaintiff has "sporadic moments of delusional speech." *See* Dkt. 1-1, at 44. However, plaintiff has not alleged that his reputation was injured in connection with a federally protected right or that he was denied a federally protected right. Therefore, plaintiff has failed to state a colorable § 1983 claim against defendant Fletcher.

INSTRUCTIONS TO PLAINTIFF AND THE CLERK

Due to the deficiencies described above, unless plaintiff shows cause or amends the proposed complaint, the Court will recommend dismissal of the proposed complaint without prejudice. If plaintiff chooses to amend his proposed complaint, he must file his amended

proposed complaint on or before **November 26, 2021**. Failure to do so or to comply with this Order will result in the undersigned recommending dismissal of this matter without prejudice.

The amended complaint must be legibly rewritten or retyped in its entirety, it should be an original and not a copy, it should contain the same case number, and it may not incorporate any part of the original complaint by reference. The amended complaint will act as a complete substitute for the original complaint, and not as a supplement.

An amended complaint supersedes all previous complaints. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) *overruled in part on other grounds, Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Therefore, the amended complaint must be complete in itself, and all facts and causes of action alleged in the original complaint that are not alleged in the amended complaint are waived. *Forsyth*, 114 F.3d at 1474.

The Clerk is directed to send plaintiff the appropriate forms so that he may file an amended complaint. The Clerk is further directed to send copies of this Order to plaintiff.

If plaintiff fails to file an amended complaint or fails to adequately address the issues raised herein on or before **November 26, 2021**, the undersigned will recommend dismissal of this action pursuant to 28 U.S.C. § 1915.

Dated this 27th day of October, 2021.

J. Richard Creatura
Chief United States Magistrate Judge